Supreme Court, U. S.
FILED
APR 23 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1975

No. 75-1531

OLIVER H. WHITE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Marvin Alan Rosman and
Thomas B. Dorrier
MILLER AND ROSMAN
1508 Willow Lawn Drive
Richmond, VA 23230,
Counsel for Petitioner

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Constitutional provisions and statutes involved	2
Statement of the case	3
Reasons for granting the writ	5
Conclusion	9
Appendix	11

CITATIONS

Cases:

Adamson v. California, 336 U.S. 46	8
Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946)	6
United States v. Bishop, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973)	4
United States v. Murdock, 290 U.S. 398, 390, 54 S.Ct. 223, 226 (1933)	4

Statutes:

26 U.S.C. §7203	2

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1975

No. _____

OLIVER H. WHITE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on March 24, 1976.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals below (App., p.12), was not reported. Defendant was tried by the United States District Court for the Eastern District of Virginia, at Alexandria, by a jury, and that Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on March 24, 1976, and a copy thereof is appended to this Petition in the Appendix at page 12. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Rehearing by the Court of Appeals was not sought.

QUESTIONS PRESENTED

I. Did the trial court err in its instructions on willfulness by giving a confusing instruction and by not properly including the concept of justifiable excuse?

II. Did the trial court err in failing to enforce its own order requiring the Government to produce possible prejudicial press releases and in its failure to sanction the Government for releasing these press releases?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions involved are the due process clause of the Fifth Amendment and the due process clause and equal protection clause of the Fourteenth Amendment. The statute under which the Defendant was convicted is 26 U.S.C. §7203, which is set out here in full as follows:

"Any person required under this title to pay any estimated tax

or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851."

STATEMENT OF THE CASE

This petition seeks review of the conviction of the Petitioner of willful failure to file his income tax returns for the years 1967, 1968 and 1969, in violation of 26 U.S.C. §7203. Prior to Petitioner's trial certain news releases were provided by the Government to the press. Petitioner's motion for dismissal of the information on the ground that the Government's dissemination of these news releases violated his Constitutional rights was denied. Petitioner's motion for production of said news releases was granted by the trial court but the Government failed to produce the news releases. Petitioner's motion to sanction

the Government for this failure by continuing his case or by dismissing the information against him was denied by the trial court.

Petitioner and the Government entered into a stipulation such that the only issue for the jury to determine in this case was the issue of willfulness. Petitioner then defended his failure to file by the introduction of expert testimony and other evidence that due to emotional and psychological illness, Petitioner was unable to timely file his returns as required by law.

The only issue in this trial was the issue of willfulness. The charge as given is set out in full as it relates to willfulness in the Appendix at page 3. Petitioner objected to the charge as given since it did not comply with the standards set out by this Court in United States v. Murdock, 290 U.S. 398, 390, 54 S.Ct. 223, 226 (1933) and in United States v. Bishop, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973).

After deliberating for a little over one hour, the jury returned and asked for further instruction on the issue of willfulness and insanity. The Court gave only a part of the original charge on willfulness and the defendant again objected.

The jury found the defendant not guilty on Count I (1967) and guilty on Count II and Count III (1968 and 1969). The Court sentenced the Defendant to six months on each count to run concurrently.

On appeal, the Court of Appeals affirmed in a per curiam opinion. The Court did not deal with the question of the news releases and dealt only in a cursory way with the misinstruction on willfulness.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because (I) it decides a federal question in a way in conflict with the decisions of this Court (Murdock and Bishop, supra) and (II) because the failure of the Circuit Court to act upon the trial court's failure to sanction the Government either for the intentional dissemination of its news releases or for its failure to produce said news releases is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

I. The only issue in this trial was the issue of willfulness. Clearly, this was the crucial factor which would convert the defendant's late filing of his returns into a criminal offense. While the term "willfulness" has generally been interpreted to mean a voluntary, intentional violation of a known legal duty, this Court has emphasized that bad faith or evil motive must be found to exist in tax cases. United States v. Bishop, supra.

The Court twice gave confusing language on this point, saying that an act done willfully is one done with evil motive and bad purpose but evil does not mean wicked or morally depraved. De-

fendant contends that evil motive and bad purpose when related to willfulness in tax cases does mean wicked or morally depraved as expressly clarified by this Court in Bishop, supra. Nowhere in any tax case has defendant found the languate used by the trial court qualifying the word evil. Most probably it applies to willfulness where there is some overt act in a malum in se crime. Certainly, it is erroneous in a malum prohibita tax offense.

When the jury returned and requested further instruction on the meaning of willfulness they were entitled to a complete charge on that point. In Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946), this Court said

> "Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." (Emphasis added)

This means the additional charge on willfulness should have been a complete charge on that point.

Obviously, when the jury returned seeking further instruction, they were in doubt as to defendant's willfulness and as to his state of mind concerning this offense. The charge as then given

was simply not a fair instruction. Again, the Court made the confusing statement that evil motive or bad purpose does not mean wicked or morally depraved, but further compounded its error by making no mention whatsoever of justifiable excuse or of the fact that defendant should be found not guilty if his failure to file resulted from mistake, accident or other innocent reason. These instructions as given in the second charge clearly do not meet the standards set forth in Bishop and Murdock, supra.

Under the evidence of the case, the jury could have found that defendant's emotional and psychological state did not amount to insanity under the law but did amount to an innocent justification for his failure to file. The instructions as given to the jury did not entitle them to make this finding but forced them to either find the defendant insane or find his failure to file to be willful. All the defendant needed to be acquitted was a mental condition negating mens rea, not necessarily a mental condition amounting to insanity. The charge as given fell far short of allowing the jury to make this finding.

In Murdock, supra, this Court observed that one who acts deliberately and intentionally and without legal justification must still be found not guilty if he did not possess, in addition, a state of mind which manifested a bad purpose or evil motive to violate the law. Murdock, 290 U.S. at 397-98, 54 S.Ct. 223. The trial court's instruction clearly did not embody this concept.

II. The Government issued certain press releases to various newspapers announcing the prosecution of the Defendant. Defendant objected to this dissemination both in a motion to transfer the case to a different division of the Eastern District of Virginia and in a motion to dismiss the information against the Defendant. Said news releases presented a distorted picture of the culpability of the Defendant by reporting gross income figures without mention or explanation that such gross income figures do not represent the net or taxable income of the Defendant. Defendant was unable to ascertain what other distortions or prejudicial information was published because the Government never complied with the Court's order to produce copies of said news releases. Such news releases serve no beneficial public interest and violate the rights of the Defendant, being a denial of the due process of law required under the Fifth Amendment to the Constitution of the United States because the Government's unilateral action in issuing news releases to the public media offends the traditional concept of fair play and substantial justice as understood by the English speaking people and is a violation of the equal protection guarantees of the Fourteenth Amendment of the United States Constituion and as this Court said in Adamson v. California, 336 U.S. 46:

> "Judicial review of that guaranty [due process] of the Fourteenth Amendment inescapably imposes on this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether

> they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

The Defendant moved the trial court for a continuance or dismissal based on the Government's failure to produce said news releases as required by the trial court. The trial court denied this motion and in effect allowed the Government to ignore its order without sanction. The fact that said press releases were not produced rendered the Defendant unable to determine adequately to what extent his Constitutional rights had been violated.

Dissemination of such press releases appears to be a regular concerted IRS policy with the obvious purpose of creating a public stigma against accused tax violators. This policy is offensive to the rights of this Defendant and to defendants generally and should not have been allowed by the trial court and the Circuit Court without sanction and this Court should exercise its supervisory responsibility by rejecting such conduct by the Government.

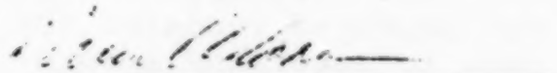
The action of the District Court and the Court of Appeals in ignoring this gross abuse of Defendant's rights is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision and this Court should grant a writ of certiorari in this case so that it may instruct the

lower courts to give the Defendant a new trial including all the rights provided by the Constitution of the United States and by law.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully,



Marvin Alan Rosman,
Of Counsel

MILLER AND ROSMAN
Suite 200
1508 Willow Lawn Drive
Richmond, Virginia 23230
(804) 288-3191

APPENDIX

DECISION FROM BELOW

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 74-2024

United States of America,

Appellee,

versus

Oliver H. White,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued Jan. 5, 1976 Decided Mar. 24, 1976

Before HAYNSWORTH, Chief Judge, RUSSELL WIDENER, Circuit Judges.

Marvin A. Rosman (Abady, Miller and Rosman on brief) for Appellant; Stephen R. Pickard, Assistant United States Attorney, (William B. Cummings, United States Attorney, on brief) for Appellee.

PER CURIAM:

A jury convicted Oliver H. White of wilfully failing to file income tax returns for the years 1968 and 1969 in violation of 26 U.S.C. §7203. We affirm the convictions.

White, a certified public accountant, prepared and filed tax returns for clients during 1968 and 1969, but he failed to timely file his own returns. He requested extensions of time in which to file. The I.R.S. granted a limited extension in 1968, but denied such a request in 1969 and ordered White to file within ten days. White finally mailed his tax returns to the I.R.S. for 1968 and 1969 on June 14, 1971.

On appeal, White raises several issues. He initially questions the sufficiency of the evidence presented to convict him. At trial the defendant contended that an emotional condition prevented him from filing his own tax returns. This created an issue for the jury; we may not disturb the jury's resolution of it.

White also objects to the court's instruction defining the element of willfulness. The charge given was adequate. The court correctly characterized "willful" as voluntary, intentional, in bad faith, with a bad purpose, by an evil motive, but not wicked or morally depraved. The charge incorporates the gist of the one upheld in Yarborough v. United States, 230 F.2d 56, 71 (4th Cir. 1956), and substantially embodies the

the meaning given "willful" by other courts. See e.g., United States v. Bishop, 412 U.S. 346, 361 (1973), United States v. Platt, 435 F.2d 789, 794-795 (2nd. Cir. 1970).

AFFIRMED.

COURT'S CHARGE ON WILLFULNESS

"Willful" means voluntary and intentional and with the specific intent to do something the law forbids, or with a bad purpose to omit to do something the law requires to be done.

In deciding whether the Defendant's failure to file the returns was willful, you must decide whether it constituted a voluntary, intentional disregard of a known legal duty.

To act willfully in failing to file tax returns is to act in bad faith or with a bad purpose or evil motive or failing to do that which is known to be specifically required by law.

If you find from the evidence the Defendant's failure to file tax returns was prompted by the evil motive to omit to do something that he knew that the law required, then you could find that he acted willfully.

"Evil motive" or "bad purpose," as those terms are used here, does not mean wicked or morally depraved motive or purpose. It means a conscious, deliberate, intentional refusal to do something the Defendant knows the law requires him to do.

As indicated, the crime charged in this case requires proof of specific intent before the Defendant can be convicted.

Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that the Defendant knowingly -- that is, voluntarily and intentionally and not because of mistake or accident or other innocent reason -- knowingly committed an act which the law forbids, purposely intending to violate the law.

Intent ordinarily may not be proved directly, because there is no way of fathoming or scrutinizing the operation of the human mind, but you may infer the Defendant's intent from the surrounding circumstances.

You may consider all statements made or acts done or omitted by the Defendant and all other facts and circumstances in evidence which indicate his state of mind.

It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

(After the court gave the jury other instructions, it retired. The jury later returned and requested further instructions on willfulness and insanity. The court then gave the following charge on willfulness.)

"Willful" means voluntary and in-

tentional and with the specific intent to do something the law forbids; that is to say, with the bad purpose to either do something the law forbids or omit to do something the law requires.

In deciding whether the Defendant's failure to file returns was willful, you must decide whether it constituted a voluntary, intentional violation of a known legal duty.

To act willfully in failing to file returns is to act in bad faith or with bad purpose or evil motive or failing to do that which is known to be specifically required by law.

If you find, therefore, that the Defendant's failure to file tax returns was prompted by the evil motive to omit to do something that he knew the law to require, then you may find that he acted willfully.

Evil motive or bad purpose, as used here, does not mean wicked or morally depraved motive or a purpose which means a conscious, deliberate and intentional refusal to do something he knows the law requires to be done.

Insofar as insanity is concerned, the law, as indicated, the law does not hold a person criminally responsible or accountable for his conduct while insane, since an insane person is not capable of forming the intent essential to the commission of a crime.

The sanity of the Defendant at the time of the commission of the alleged

offense is an element of the crime charged and must be established by the Government beyond a reasonable doubt, just as it must establish every other element of the offense charged.

A Defendant is isane within the meaning of these instructions if at the time of the alleged criminal conduct, as a result of mental disorders or mental defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law.

I will repeat that. He is insane within the meaning of the instructions if at the time of the alleged criminal conduct, as a result of mental disorder or mental defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

You should, of course, consider all the other instructions that were given at the time of the charge, including the presumption of innocence and burden of proof beyond a reasonable doubt.

Those, I believe, are the instructions which answer your specific inquiry.

CERTIFICATE

I hereby certify that three true and exact copies of the foregoing Petition were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 23rd day of April, 1976.

Marvin Alan Rosman,
Of Counsel

Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

No. 75-1531

In the Supreme Court of the United States

OCTOBER TERM, 1975

OLIVER H. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1531

OLIVER H. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court incorrectly charged the jury with respect to the element of willfulness in this prosecution for failure to file income tax returns.

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of willfully failing to file income tax returns for the years 1968 and 1969, in violation of 26 U.S.C. 7203 (Supp. Tr. 61).[1] The court imposed concurrent prison sentences of six months on each count (Pet. 4). The court of appeals affirmed (Pet. App. 12-14).

---

[1]"Tr." refers to the transcript of testimony at trial. "Supp. Tr." refers to the transcript containing the summations of counsel, the instructions to the jury, and the verdict.

The evidence produced at trial was as follows: Petitioner is a certified public accountant. During 1968 and 1969, he prepared and filed tax returns for clients but failed to file his own returns within the prescribed time limits. In January 1971, an agent of the Internal Revenue Service advised petitioner that the Service had no record of his having filed income tax returns for the years 1967 through 1969. On April 2, 1971, the Internal Revenue Service formally notified petitioner that it was conducting a criminal investigation of him. In June 1971, petitioner filed tax returns for 1968 and 1969. During the investigation petitioner told an Internal Revenue Service agent that his failure to file returns was the result of "stupidity and procrastination" (Tr. 274); and that it was his responsibility to file and he would have to take the responsibility for not doing so (Tr. 275).

Petitioner consulted a psychiatrist one year after he filed the tax returns (Tr. 214). The psychiatrist testified at trial that petitioner's failure to file the returns resulted from various personality defects and emotional problems. The psychiatrist stated that petitioner's "mental illness and because of the relationship between his mental illness and * * * [his wife's] mental illness * * * [resulted in his inability] to act in any other way than * * * he did" (Tr. 222-234).[2] A psychiatrist called by the government testified that since petitioner was able to function in the income tax area "in relationship to his clients, he must have been able to handle the same sort of problems in relation to his own affairs" (Tr. 285).

---

[2]On cross-examination, petitioner's psychiatrist stated that it was his opinion that petitioner could not conform his conduct to the requirements of the law requiring the filing of tax returns "because of his own psychopathology and the pathology of his wife and the interaction between them" (Tr. 237).

On the issues of willfulness and mental capacity the district court charged the jury as follows (Supp. Tr. 45-47):

> "Willful" means voluntary and intentional and with the specific intent to do something the law forbids, or with a bad purpose to omit to do something the law requires to be done.
>
> In deciding whether the Defendant's failure to file the returns was willful, you must decide whether it constituted a voluntary, intentional disregard of a known legal duty.
>
> To act willfully in failing to file tax returns is to act in bad faith or with a bad purpose or evil motive or failing to do that which is known to be specifically required by law.
>
> If you find from the evidence the Defendant's failure to file tax returns was prompted by evil motive to omit to do something that he knew that the law required, then you could find that he acted willfully.
>
> "Evil motive" or "bad purpose," as those terms are used here, does not mean wicked or morally depraved motive or purpose. It means a conscious, deliberate, intentional refusal to do something the Defendant knows the law requires him to do.
>
> As indicated, the crime charged in this case requires proof of specific intent before the Defendant can be convicted.
>
> Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the Government must prove that the Defendant knowingly—that is, voluntarily and intentionally and not because of mistake or accident or other innocent reason—knowingly committed an act which the law forbids, purposely intending to violate the law.

* * * * *

Under the Defendant's plea of not guilty there is an issue here as to his sanity at the time of the alleged offense.

The law does not hold a person criminally accountable for his conduct while insane, since an insane person is not capable of forming the intent essential to the commission of a crime.

The sanity of the Defendant at the time of the commission of the alleged offense is an element of the crime charged and must be established by the Government beyond a reasonable doubt, just as it must establish every other element of the offense charged.

A Defendant is insane within the meaning of this instruction—these instructions—if at the time of the alleged criminal conduct, as a result of mental disorder or mental defect he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.[3]

1. Petitioner contends (Pet. 5-7) that the trial court's instructions with respect to willfulness conflict with *United States* v. *Murdock*, 290 U.S. 389, and *United States* v. *Bishop*, 412 U.S. 346, because it charged the jury that "evil motive" or "bad purpose" does not mean "wicked or morally depraved motive or purpose." But nothing in those decisions supports petitioner's

[3]Shortly after the jury began its deliberations it asked to be reinstructed on the issues of willfulness and insanity (Supp. Tr. 57). The court thereupon reread the instructions, substantially as quoted above (Supp. Tr. 58-60).

argument (Pet. 6-7) that "willfulness" means conduct prompted by moral depravity. Indeed, the jury charge here is in complete accord with this Court's statement in *Bishop* that "the word 'willfully' in these [criminal tax] statutes generally connotes a voluntary, intentional violation of a known legal duty" (412 U.S. at 360). See also *Spies* v. *United States*, 317 U.S. 492, 497-498.[4]

There is likewise no basis to petitioner's further argument (Pet. 7) that the trial court committed reversible error by failing to repeat in its supplemental instruction the admonition that petitioner could not be found guilty if the failures to file resulted from "mistake, accident or other innocent reason." The court's supplemental instruction (Supp. Tr. 58-60) included the statement that the jury must decide whether the failure to file "constituted a voluntary, intentional violation of a known legal duty" (Supp Tr. 58). This was sufficient to reaffirm in the jurors' minds that a guilty verdict could not be returned if the failure to file resulted from a mere mistake, accident or other innocent reason rather than from intentional wrongdoing.[5]

Petitioner further argues (Pet. 7) that under the evidence the jury could have found that petitioner's mental condition did not amount to insanity but did amount to

[4]The petition does not raise the question presented in our petition for a writ of certiorari in *United States* v. *Pomponio*, No. 75-1667, *i.e.*, whether the jury must be instructed that bad purpose or evil motive is an element of the offense and that "good motive" negates the element of willfulness necessary to support a conviction.

[5]Petitioner's reliance (Pet. 6) upon *Bollenbach* v. *United States*, 326 U.S. 607, is misplaced. There, the Court held that the supplemental instruction given by the trial court was substantively incorrect.

an innocent justification for his failure to file and that the district court's instructions improperly forced the jury to choose between finding him to be insane or his conduct to be willful. Apart from the fact that petitioner made no such objection at trial and did not raise the point in the court of appeals (see Rule 30, Fed. R. Crim. P.; *Lawn* v. *United States*, 355 U.S. 339, 362-363, n. 16; *Duignan* v. *United States*, 274 U.S. 195, 200; *Husty* v. *United States*, 282 U.S. 694, 701, 702), the court's instructions were correct and in complete accord with petitioner's defense that he was unable to conform his conduct to the requirements of the law. See, *e.g.*, *United States* v. *Chandler*, 393 F.2d 920 (C.A. 4) (*en banc*); *United States* v. *Freeman*, 357 F.2d 606 (C.A. 2); *United States* v. *Shapiro*, 383 F.2d 680 (C.A. 7) (*en banc*).

2. Petitioner also argues (Pet. 8-10) that the prosecutors failed to comply with an order of the district court to produce copies of certain press releases issued by the Internal Revenue Service about this case. But the court in fact excused the government from compliance with this order (see Pet. 9).[6] Moreover, petitioner suffered no prejudice as a result of the Service's issuance of a press release or of any attendant pre-trial publicity. In selecting the jury, the trial judge asked each member of the jury on *voir dire* whether any of them had read anything about the case in the news media which would render them unable to be impartial jurors, and none of the members indicated that he had (Tr. of June 6, 1974, pp. 5-6).

---

[6]The trial court denied petitioner's motion "to compel the government to produce it and put it in the file or exercise such appropriate sanctions and continue the case until they do produce it" (Tr. 4-5).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

Supreme Court, U. S.
FILED
AUG 23 1976
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1975

No. 75-1531

OLIVER H. WHITE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Marvin Alan Rosman and
Thomas B. Dorrier
MILLER AND ROSMAN
1508 Willow Lawn Drive
Richmond, Virginia 23230,
Counsel for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1531

OLIVER H. WHITE, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Government's Memorandum in Opposition contains several misstatements of fact to which Petitioner feels compelled to respond. At page 4 in footnote 3 of the Government's memorandum it is stated that, "Shortly after the jury began its deliberations it asked to be reinstructed on the issues of wilfulness and insanity (Supp. Tr. 57). The court thereupon reread the instructions, substantially as quoted above (Supp. Tr. 58-60)." This misstatement compromises the main thrust of Petitioner's primary allegation of error. When the jury returned and asked for further instruction, the

court gave a portion of same instruction as before but left out the part pertaining to specific intent. The omitted instruction was the only place where the court had made any attempt to explain to the jury the concept of justifiable excuse. The confusing language saying evil motive and bad purpose does not mean wicked or morally depraved had already minimized the jury's concept of the mens rea required for this offense, and it is easy to see how the jury could have believed that Petitioner's failure to file his income tax returns was caused by his mental and emotional state which of course would be an innocent justification for his failure tc file, yet the jury was unable to acquit him under the charge given since the instructions left the impression that they would have to find him insane to find him not guilty.

The Government argues that Petitioner has not made this argument before his brief in this Court. The record is replete with requests that the trial Court charge the jury using the language found in United States v. Murdock, 290 U.S. 398, 390, 54 S.Ct. 223, 226 (1933), including the terms "stubbornly, obstinately, perversely" (Supp. Tr. 55). Petitioner's counsel even interrupted motions on other cases in the trial Court while the jury was out so that he could implore the Court to include the appropriate language defining the state of mind required. (Supp. Tr. 61). Petitioner both at the trial and on appeal has taken the position that the trial Court's instructions on wilfulness did not properly define the state of mind required

for this offense, nor did they properly embody the concept of justifiable excuse. From the evidence of this case, the jury could have found that Petitioner's mental condition caused his failure to file, yet under the instructions given could have felt that this was not a justifiable excuse since it did not amount to insanity. Therefore, they could find the defendant guilty even though his failure to file was caused by an innocent reason.

The Government's memorandum at page 5, footnote 5, states that Petitioner has misplaced reliance on Bollenbach v. United States (326 U.S. 607, 66 S.Ct. 402, 90, L.ED. 350 (1946). Bollenbach is cited for the simple and obvious proposition that when the jury requests further charge on a subject, the trial court is obligated to give a full and complete charge on that subject. In this case, when the jury requested further instructions on wilfullness and insanity, the Judge failed to give any instruction embodying the concept of justifiable excuse and thereby did not give a full and complete charge on the subject.

For these reasons and for the reasons set forth in the Petition in this case, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Marvin Alan Rosman
Thomas B. Dorrier,
Counsel for Petitioner